Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-5566

PEARL BARRETT,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals reported at 504 F.2d 629 (1974), and is reproduced in the Appendix. A copy of the verdict and orders of the District Court for the Eastern District of Kentucky is also contained in the Appendix.

JURISDICTION

The judgment of the United States District Court for the Eastern District of Kentucky, Jackson Division, was entered against petitioner on May 24, 1973 convicting him of receiving and possessing a firearm transported in interstate commerce, having been convicted of a felony, in violation of Title 18, Section 922(h), United States Code. The United States Court of Appeals for the Sixth Circuit affirmed the conviction on October 18, 1974, stating that there was no ambiguity in Section 922(h), and that the United States did not have to prove that petitioner himself was directly involved in the interstate transportation of the firearm. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and Part V of the Rules of this Court; and more specifically because the Court of Appeals has rendered a decision which is in conflict with other Courts of Appeals on the same matter, namely the Eighth Circuit Court of Appeals' decision in *United States v. Ruffin*, 490 F.2d 557 (8th Cir., 1974); and in addition, the decision in this matter is in conflict with the Supreme Court's finding in *United States v. Bass*, 404 U.S. 336 (1971).

QUESTION PRESENTED

Whether Title 18 U.S.C. Section 922(h) applies to petitioner who purchased a firearm in an intrastate transaction, and was not involved in any manner with the interstate transportation of said firearm.

STATUTE INVOLVED

Title 18 U.S.C. Section 922(h)

It shall be unlawful for any person----

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, . and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

On or about the first day of April, 1972, petitioner Pearl Barrett bought a Smith and Wesson .38 caliber pistol from Larry D. Bates, the owner and operator of the Western Auto Store in Bonneville, Kentucky. Some time after that purchase, Barrett was stopped by the Owsley County, Kentucky Sheriff's Department for driving while under the influence of an alcoholic beverage, and the firearm was discovered on the floor of his car and confiscated.

Subsequent to the arrest for drunk driving, a warrant was issued for petitioner's arrest for a violation of the Gun Control Act, and more specifically, Title 18 U.S.C. Section 922(h). Petitioner had been previously convicted of a felony in January, 1967, and Section 922(h) prohibits a convicted felon from possessing a firearm. Petitioner was then tried and convicted of this offense in the United States District Court for the Eastern District of Kentucky at Jackson on May 24, 1973. Prior to and during the trial, defense counsel moved to quash the indictment on the basis that petitioner had received, on June 20, 1969, by virtue of executive order of the Governor of Kentucky, a Restoration of All Civil Rights lost due to his felony conviction of January, 1967, but the trial court denied these motions.

This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit, after oral argument, on October 18, 1974.

SUMMARY OF ARGUMENT

Petitioner's act of purchasing a weapon in his home town was purely an intrastate transaction. Petitioner, himself, took no direct steps to have the weapon shipped to him, nor did he then travel to another state with said weapon.

The interpretation of 18 U.S.C. Section 922(h) by the courts has been that its principle purpose is to prevent certain classes of persons from buying or selling guns across state lines. It was enacted to regulate gun trafficking. As such, for an offense to be committed under Section 922(h), the offender must have had some

connection with the actual transportation of the weapon in interstate commerce. The mere fact that the weapon itself had previously travelled across state lines is not sufficient to support an offense under Section 922(h), without the showing that the person charged had some direct connection with that transportation.

The legislative history of the statute is clearly in support of the position that some direct connection between the possessor of the weapon and interstate commerce is required. The legislators expressed great concern over gun trafficking, and thus passed this Act to regulate the same. The Act was never intended to apply to one who purchased a firearm in an intrastate sale.

ARGUMENT

I.

THE SCOPE OF TITLE 18 U.S.C. 922(h) DOES NOT EXTEND TO THOSE PERSONS WHO ARE MERELY IN POSSESSION OF A FIREARM, AND WHO HAVE NOT BEEN INVOLVED WITH, OR PARTICIPATED IN, THE INTERSTATE TRANSPORTATION OF THAT FIREARM.

A. Petitioner's acquisition of the firearm here in question was purely an intrastate transaction.

Petitioner acquired the Smith and Wesson .38 caliber pistol, which is the subject matter of this case, in his home town of Booneville, Kentucky. He bought it from the owner and operator of the Western Auto Store, Mr.

Larry D. Bates, himself a resident of Booneville. No other parties were involved; the gun was sold over the counter to Mr. Barrett, and he left the store with it in his possession. (Unlike many other cases involving Section 922, in this transaction the petitioner was never asked to read and sign Federal Form #4473, (R, 45, 46, 47, 67), and so there is not question here of swearing to false information).

The facts, as presented, illustrate a sale of a firearm by a Kentucky merchant, to a Kentucky resident, within the borders of the Commonwealth of Kentucky. On its face, this transaction has no apparent connection with interstate commerce. The petitioner is not a gun dealer, nor is there evidence that he was planning to leave the state with it, or that he planned to commit a felony while using the weapon. On its face, this sale evidences nothing which should bring it within the purview of Section 922(h).

It is only when evidence is presented that the seller had purchased the gun from a distributing house in North Carolina, (R.40), and that the gun had been originally manufactured in Massachusetts, (R. 52), that interstate commerce enters the transaction. But this interstate commerce nexus can only remotely be connected to the petitioner. He was never personally involved in the interstate transportation of the weapon; he did not request that it be shipped from out-of-state; nor did he transport it across any state lines. The original origin of the gun had no significance to him. Evidently he felt he would have no trouble purchasing a gun in his home state. This differs greatly from instances where a resident of one state realizes the difficulties of purchasing a gun in his home state, and

either drives to another state or orders the gun from a mail catalog. In those instances, the state of origin of the weapon is of primary importance, for the weapon will travel across state lines. The buyer is generally aware of the ease with which he can purchase a gun in an out-of-state transaction, and can readily avail himself of the opportunity. In addition, he is usually buying a gun from another state to avoid the legal restrictions in his home state.

None of these circumstances occurred in Booneville, Kentucky. Petitioner went to the local hardware store and bought a pistol. The sale was plainly an intrastate transaction, and, as such, was not prohibited by Title 18 U.S.C. Section 922(h).

B. Title 18 U.S.C. Section 922(h) does not apply to purely intrastate sales or possessions; rather, it deals with interstate transportations and trafficking of firearms and dangerous weapons.

At the outset, it is admitted that Congress has the power to regulate interstate gun trafficking by virtue of the Commerce Clause of the United States Constitution. The question here deals basically with the scope of this legislated coverage, Section 922(h), a statute duly passed by Congress. A broad statement as to the extent of Title IV was made by the Fifth Circuit in *United States v. Lebman*, 464 F.2d 68, 70 (1972):

> "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate

> commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *M'Culloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)."

Accepting that Congress may regulate interstate gun sales, the question then becomes twofold: (1) Did petitioner's possession of this firearm "so affect interstate commerce;" and (2) Did Congress intend that possessions which had no immediate, direct connection with an interstate transportation be covered under this statute?

It is difficult to imagine how a single person who purchases a weapon in his home town could affect interstate commerce in any manner other than quite indirectly. Various courts have considered the effect of the violations under Title IV, but few of the decisions have dealt specifically with mere possessions. The Seventh Circuit in the case of *United States v. Hornbeck*, 489 F.2d 1325, 1326 (1973) talked of Congress' power to "impose criminal sanctions for the purpose of regulating purely intrastate activities which substantially affect interstate commerce." And the Ninth Circuit, in *United States v. Petrucci* 486 F.2d 329 (1973) supported this position. But both cases were concerned with 922(a)(1) violations which proscribed dealing in firearms. Both courts justifiably found that the selling of firearms could and did affect interstate commerce.

An important decision from the Sixth Circuit, *United States v. Day*, 476 F.2d 562 (1973), explored in some

depth the rationale of regulating the business of selling guns:

> "In *Perez v. United States*, 402 U.S. 146 (1971), the Supreme Court analyzed anew the scope of Congressional power to regulate purely intrastate activities under the Commerce Clause. As the Court stated: 'The Commerce Clause reaches, in the main, three categories of problems. First the use of channels of interstate or foreign commerce which Congress deems are being misused . . . Second, protection of the instrumentalities of interstate commerce . . . Third, those activities affecting commerce.' 402 U.S. at 150." *Id.* at 566.

The Sixth Circuit had no trouble in finding an interrelation between selling guns, with which defendant Day was charged, and interstate crime and gun trafficking. The effect on interstate commerce was clear, and the possible danger to citizens even more clear if interstate gun sales were to go unregulated. The Commerce Clause unquestionably reached this type of activity.

In response to the first question posed above, it is difficult to foresee the effect on interstate commerce of one man's possession of a firearm in his own state. At the trial, the prosecution presented evidence which showed that the gun had been manufactured in Massachusetts, (R. 52), and that this, in itself, brought the sale in Kentucky within the scope of the statute. If this logic is carried only one step further, an interstate nexus could be established with any finished product, one of the components of which had been produced in another state. It is almost impossible to find a product manufactured in America which does not have an interstate connection, be it with the raw materials,

labor, shipping, etc. The government could always find that nexus if it so desired.

We contend, however, that this obscure "connection" with interstate commerce does not "affect" it so as to come within the reach of Title IV. The mere transferring of money would "affect" interstate commerce in that the money would eventually circulate into the economy and into other states, and if we are to accept that type of reasoning, an intrastate sale would clearly be covered also. But neither of these contentions can be accurate. The cases cited above, and many more not cited here, speak of an *actual* effect on commerce, not an incidental connection thereto. Selling guns, interstate shipping, mail order houses—these are activities which fly in the face of Title IV, and for which it is meant to regulate.

The scope of Title IV, and Section 922 in particular, has been discussed in many forums since its enactment. Most frequently the Courts have interpreted the statute, and almost without exception have held that it is the *business* of selling, shipping, or otherwise trafficking in weapons which is the focal point of regulation under Section 922.

The language of the Fifth Circuit in *United States v. Nelson*, 458 F.2d 556, 559 (1972) is crystal clear in defining the purpose of Section 922:

> "If Congress is to effectively prevent the interstate use of guns for illegal purposes it must control their sources: manufacturers, dealers, and importers. That is what is sought to do in Section 922."

In a later case, *United States v. Lebman*, 464 F.2d 68, 73 (5th Cir., 1972) the Fifth Circuit cited *Nelson* as

its authority for the interpretation of Section 922, and went even further and stated:

> "The principle purpose of H.R. 17735 [Section 922], as amended, is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the states effectively to regulate firearms traffic within their borders."

The Fourth Circuit concurred in the stated purpose of Title IV in *United States v. Colicchio*, 470 F.2d 977, 979 (1972).

> " 'The purpose of the Gun Control Act of 1968 . . . was . . . to strengthen Federal controls over interstate . . . commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders.' House Report No. 1577 to H.R. 17735 (P.L. 90-618) U.S. Code Cong. and Admin. News, 1968, p. 4411. Congressional purpose was, therefore, to strictly control the illegal transfer of firearms. The interstate sales are part of a pattern which affects the nationwide traffic in firearms."

Although these cases have dealt with those individuals charged with selling or dealing firearms in interstate commerce, the language points out that the business of gun traffic is what the statute pertains to.

The circumstances of petitioner's case do not involve any aspect of gun trafficking. Petitioner's crime was simply that he was found in possession of a firearm, which was later shown to have been shipped to the seller from another state. *United States v. Ruffin*, 490 F.2d 557 (8th Cir., 1974), although it varies somewhat in the facts, also deals with a possession offense under 922(h). The weapon involved had been shipped originally from Connecticut to Texas, and had then

been stolen in Illinois some seven weeks prior to the time it was found in the defendant's possession. The Court was faced with the exact question as presented here: does Section 922(h) extend so far as to prohibit possessions which involve no direct connection with interstate transportation? The Court held unequivocally that it did not:

> "Thus we conclude that it is not sufficient under 922(h) for the government to prove that the firearm had at some remote time previously traveled in interstate commerce . . . Title IV is primarily concerned with the transportation of firearms. Accordingly, for a receipt to be cognizable under 922(h), the government must show that at the time the gun was received it was *part* of an interstate transportation." *Id.* at 560.

Surprisingly, the Sixth Circuit, prior to its opinion in petitioner's case, held exactly as the Eighth Circuit in *Ruffin*. In the decision handed down in *United States v. Craven*, 478 F.2d 1329, 1336 (1973), the Court stated:

> "Therefore, we conclude that 18 U.S.C. Section 922(h) speaks only of receipt of firearms or ammunition in interstate transportations and does not concern possessions at all."

Although the Court ultimately upheld Craven's conviction, it was because the evidence indicated that the defendant had been involved in a second and more recent transportation, and that this met the requirements of 922(h) as to the interstate transportation. But the language quoted above appeared to be clear that a possession alone was not sufficient to uphold a conviction. Yet the Court reversed itself in petitioner's case and stated that once the firearm travelled out of

its state of origin, the ultimate purchaser or possessor had best beware, for the reach of 922(h) would extend to him. There is little explanation for this departure from precedent, and much difficulty in understanding its rationale in light of this Court's language in *United States v. Bass*, 404 U.S. 336, 342 (1971). Justice Marshall, in delivering the opinion for the majority, stated:

> "Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation."

This language of *Bass* was based in part on the prior history of the Gun Control Act of 1968, which was a modified version of 15 U.S.C. Section 902(e) and (f), which in turn had amended the first such statute, 52 Stat. 1250, 1251 (1938). The original statute contained a presumption that mere possession of a firearm was sufficient to justify the finding that it was a product of interstate commerce. That presumption was struck down in *Tot v. United States*, 319 U.S. 463, 466 (1943):

> "The Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate."

As early as 1943 the Court felt that more than merely possessing a gun which had been previously shipped interstate was required to support a Gun Control Act violation. Section 922(h) is part of Title IV of the Omnibus Crime Control and Safe Streets Act of

1968, Public Law Number 90-351, and its legislative history supports the position taken by petitioner throughout his appeals, that being the same as set out in *Ruffin, Bass, Tot,* and *Craven*: the purpose of the Act was to control gun trafficking.

Senate Report #1097, 2 U.S. Code, Congressional and Administrative News, pp. 2112-2248 (1968), is a lengthy explanation and history of the Act, and provides the best source for the purpose and scope of the bill. The purpose of the Act was explained as follows:

> "The existing Federal controls over interstate and foreign commerce in firearms are not sufficient to enable the States to effectively cope with the firearms traffic within their own borders through the exercise of their police power. Only through adequate Federal control over interstate and foreign commerce in firearms, and over all persons engaging in the business of importing, manufacturing, or dealing in firearms, can this problem be dealt with and effective State and local regulation of the firearms traffic be made possible." *Id.* at 2114.

The heart of the Act was to deal with *businesses*, not individuals per se. The legislators were most concerned with those persons who dealt in firearms, since regulation of the source is an easier method to control gun use than regulating the users themselves. The Committee reported five major problem areas with which the Act was to deal: (1) mail order houses; (2) any out-of-state, non-resident sources; (3) imported firearms; (4) the ease with which anyone could become licensed as a dealer in firearms; and (5) the ease with which anyone could acquire a destructive device. *Id.* at

2164-2165. The scope of the coverage was to include: (a) interstate traffic in mail order firearms other than rifles and shotguns; (b) acquisition of firearms by juveniles and minors; (c) out-of-state purchase of concealable firearms; (d) importation of nonsporting and military surplus firearms; (e) highly destructive weapons; (f) licensing of importers, manufacturers, and dealers; (g) recordkeeping provisions; and (h) the transfer of the Federal Firearms Act from Title 15 to Title 18. *Id.* at 2166-68.

The report then analyzed each section within the Act, and for Section 922(h) made this comment:

> "This subsection prohibits any person from receiving, etc., any stolen firearm or ammunition 'moving as,' etc., in interstate or foreign commerce. This prohibition is a modified form of the restriction in 15 U.S.C. 902(h) of the present Federal Firearms Act but the restriction would go to ammunition for destructive devices rather than pistol and revolver ammunition." *Id.* at 2205

It is obvious from these comments that the Act in general, and Section 922(h) specifically were neither one aimed at the possessor. A new subject matter, that being "stolen weapons" was introduced in the analysis of 922(h), but even it cannot apply to petitioner's case. The individual views of the Senators on the committee lends more support to the position urged here by petitioner. Senator Fong stated that Title IV:

> " . . . prohibits the transportation or receipt in interstate commerce of a firearm . . . knowing a felony is to be committed with it." *Id.* at 2243.

Senator Tydings, were he present at petitioner's trial, could have exonerated Mr. Barrett of all criminal

liability under Title IV. Speaking specifically to the issue before this court, Mr. Tydings said:

> "Regarding handguns, Title IV provides only that handguns must be bought in the purchaser's home state . . . Title IV provides the controls on interstate gun traffic which only the federal government can apply." *Id.* at 2247-48

He went on to say that the Act was most concerned with criminals buying guns in other states where gun purchase laws were less strict.

Senator Tydings spoke to the heart of the issue before this Court, and his comments, along with the comments of the Committee in general, provide clear information on the purpose of Title IV. It was not designed to regulate individual possessions; it was enacted to control large-scale gun dealing, and those persons *directly* involved in the business of interstate gun sales. Section 922(h) deals with those persons who directly receive those firearms in an interstate transaction. It is concerned with the person purchasing a gun from a mail order catalog, or the individual who drives across a state line and himself transports the gun back to his home state. But nowhere in the legislative history of the Act, or even in the cases which interpreted it, is there to be found the language and/or the justification for extending the interstate commerce connection to one who purchases a firearm which had been previously transported through no efforts by the purchaser. This extension is not supported by these authorities, and petitioner's conviction must be reversed because the statute clearly does not apply to him.

CONCLUSION

The opinion of the Sixth Circuit Court of Appeals upholding petitioner's conviction under Title 18 U.S.C. Section 922(h) must be reversed for the reason that the statute does not apply to petitioner, who only possessed a firearm, and did not involve himself in the interstate transportation of that weapon.

Respectfully submitted,

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